75-1196

FEB 21 1976
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

JOHN THEODORE GILBERT,

Petitioner,

v.

AMERICAN EAGLE TANKER CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONALD D. OLMAN
Attorney for Petitioner
276 Fifth Avenue
New York, New York 10001

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, JOHN THEODORE GILBERT, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on the 25th day of November, 1975.

Reports of the Courts Below

The opinion of the United States District Court for the Southern District of New York, dated March 31, 1975, is unreported and is set forth herein; Appendix A. The Judgment thereon is set forth herein; Appendix B. The judgment of the Court of Appeals, entered November 25, 1975, is set forth herein; Appendix C. The unreported memorandum opinion of the United States Court of Appeals for the Second Circuit is set forth herein; Appendix D.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on November 25, 1975.

Questions Presented

1. Can a shipowner discharge a seaman in a foreign port with payment of less than his full earned wages without taking the seaman to a United States Consular Officer for the supervision of such discharge and payment as required by 46 U.S.C. § 682 and, thereafter, present factual issues as to whether the seaman's full wages were tendered to him at the time of discharge upon the trial of an action by the seaman to recover his wages and penalties under 46 U.S.C. § 596?

2. Does an election by a seaman upon discharge in a foreign port to take a voucher certified by the Ship's Master as to the earned wages due in lieu of cash relieve the shipowner from penalties under 46 U.S.C. § 596 for wrongfully delaying payment of the wages reflected in the voucher?

3. Can a shipowner avoid the penalty of double wages under 46 U.S.C. § 596 for withholding a seaman's wages for almost three years merely because the seaman did not present the shipowner with a voucher given to the seaman by the Ship's Master upon his discharge at a foreign port?

Reasons for Granting the Writ

The Court below in sanctioning the Trial Court's decision has curtailed the protective and remedial scheme created by Congress to secure to seamen the protection of a United States Consular Officer for the supervision of payment of their wages when discharged in a foreign country.

Shipowners today for economic reasons or otherwise for their benefit are increasingly keeping their vessels in foreign waters without touching United States ports for years at a time.

Seamen are hired and transported to the vessel and when their term of employment is completed are discharged in foreign ports.

It follows that the Congressional policy of requiring that seamen have the protection of a United States Consular Officer to supervise their discharge and settlement of their wages be adhered to more than ever.

Absent such protection, seamen are exposed to the unscrupulous actions of their employers, as the shipowner is in complete unsupervised control of the amount and method of payment of the seamen's wages at the time of discharge. He may withhold what he wishes, remove the seaman from the vessel, and delay payment with the knowledge that such lack of supervision grants him the opportunity to urge, as a question of fact, that he tendered the wages so as to avoid being penalized for the delayed payment.

Secondly, the Courts and the Congress have recognized that conditions may be such when a seaman is discharged in a foreign port that he may elect to take a voucher as certification of the amount of his wages due him in lieu of cash.

The decision of the Court below unjustly enriches a shipowner with the benefits of a seaman's labor by sanctioning delay in payment for as long as it takes a seaman to present the shipowner with the voucher and thereby discourages a seaman from accepting a voucher.

The election to accept a voucher has been construed by the Court below as constituting a tender by a shipowner to a seaman of his full wages and a fulfillment of a shipowner's duty under 46 U.S.C. § 596.

Accordingly, a shipowner may wrongfully withhold a seaman's wages and escape penalties under 46 U.S.C. § 596.

The denial of the Court below of the right of seamen to the protection of a United States Consul and the unjust results following a seaman's election to take a voucher in lieu of cash wages upon discharge in a foreign port constitutes a radical departure from the legislative policy of insuring prompt payment of seamen's wages so as to call for the exercise of this Court's power of supervision.

Statement of the Case

Petitioner brought suit to recover wages earned as a seaman in the employ of the respondent as well as penalties under 46 U.S.C. § 596 by reason of respondent's unlawful withholding of his wages. Petitioner also sought additional wages for overtime and other compensation in accordance with a collective bargaining agreement between petitioner's Union and the respondent-shipowner.

Petitioner was employed by respondent in New York City on December 28, 1971 to serve as a relief engineer aboard the respondent's vessel until such time as its regular engineer returned to the vessel. The vessel was then in the port of Ras Tanura, Saudi Arabia. Petitioner was flown there, reporting on the vessel the following day.

Petitioner served continuously on the vessel while it traded away from the United States until May 20, 1972. The vessel had been trading continuously in the Far East for approximately two and a half years prior to May of 1972.

On May 20, 1972, at the port of Ras Tanura, the Master gave petitioner $2,000.00 in cash and a voucher reflecting the balance of his wages due in the sum of $5,121.19, and ordered the petitioner off the vessel.

There was sharp conflict in the testimony before the Trial Court as to whether petitioner sought all of his wages in cash or requested nothing more than $2,000.00 cash and the voucher.

Petitioner demanded that he be discharged before an American Consular Officer. The Master advised him that there was no Consul available in Ras Tanura. Accepting the Master's representation, petitioner requested that he be carried on the vessel to Bahrein, the next port of call, for discharge before the Consul there. The Master claimed that he had no recollection of that request.

Petitioner having been ordered to leave the vessel, possibly on the threat of imprisonment, signed the Ship's articles of discharge and mutual release, under protest, was given a seaman's discharge by the Master, took the $2,000.00 cash and voucher, and left the vessel at about 11:00 p.m. on May 20, 1972. Respondent provided him with an airline ticket for repatriation to New York.

The trial testimony developed that there was a United States Consular Officer located in Dhahran, Saudi Arabia, about 45 miles or one hour's traveling time by automobile from Ras Tanura, and that the Master had gone to that Consul on a previous occasion. In fact, petitioner was taken to Dhahran by the Ship's Agent as the airport was located there.

Petitioner could not on his own go to the Consul in Dhahran because of the strict travel regulations of the Saudi Arabian Government.

The vessel sailed for Bahrein the morning of May 21, 1972, arriving there on the same day at about 1:55 p.m.

Petitioner arrived in Yokohama, Japan, where he lived, on May 28, 1972 and made a demand upon the respondent's agent in Japan for payment of the balance of his wages. Such demand was disputed by the respondent on the grounds that the agent made no mention of the demand to

respondent and in any event petitioner did not present his original voucher to the agent in Japan.

Petitioner arrived in New York on July 16, 1972 and consulted with his Union representatives with respect to collection of his earned wages and claims for additional wages. He had mailed the voucher to the Union from Japan prior thereto.

On August 22, 1972, petitioner went to the respondent's New York office with a Union representative to discuss his overtime wage claim. He did not present his original voucher but demanded the balance of his wages. Respondent disputed that the demand was made; but, although it had knowledge of the $5,121.19 undisputed wages due, it made no offer of payment.

Between August 22, 1972 and March 28, 1973, respondent and petitioner's Union representative negotiated petitioner's additional wage claims. Respondent at no time offered petitioner's representative payment of the undisputed wages, although respondent mailed a check in the sum of $76.14 representing overtime wages to petitioner on March 28, 1973.

On May 18, 1973, petitioner acting pro se instituted this action.

On July 11, 1973, respondent's attorneys wrote a letter to the petitioner relating to scheduling and taking petitioner's deposition in the action and stated in that letter that respondent was holding his wages and was prepared to pay petitioner without prejudice.

Petitioner's deposition was taken at the office of respondent's attorneys on July 25, 1973, but still no offer was made to pay the undisputed wages.

On December 5 and 6, 1974, petitioner's action was tried; but, although respondent's paymaster and Vice President were present at the trial and admitted the wages due, no offer of payment was made.

However, although the Ship's Master testified that the discharge at Ras Tanura was complete, and that petitioner was entitled to his full wages, respondent's officers testified that even if petitioner presented himself at respondent's office with the voucher, he would not have been paid until petitioner appeared before the U.S. Shipping Commissioner in New York and had the Shipping Commissioner sign the voucher and provide the petitioner with a Certificate of Mutual Release. Petitioner was never advised of this condition prior to the trial.

Subsequent to the entry of the judgment of the Trial Court and on April 18, 1975, although not part of the record below, respondent finally paid petitioner his undisputed wages, but only after the petitioner made an unnecessary appearance before the United States Shipping Commissioner in New York.

The Trial Court granted judgment in favor of petitioner in the sum of $46.56 for the shipowner's failure to credit petitioner for travel time and subsistence from the port of Ras Tanura to New York, but otherwise denied petitioner his conceded earned wages of $5,121.19 or double wages on its finding of fact that petitioner, pursuant to his request, was given $2,000.00 in cash and a voucher for the balance due in Ras Tanura, and that petitioner never presented the voucher to the respondent at its office to collect his due.

POINT I

The Court below in sanctioning the decision of the Trial Court radically departed from the unequivocal congressional policy of insuring seamen the protection of a United States Consul to supervise their discharge and payment of wages in foreign ports.

Seamen from the start were wards of Admiralty and the Legislature. *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed. 2d 456 (1971). As such, seamen as a class are entitled to every shield and safeguard that

the law can give through judicial decision and legislative enactment. *Harden* v. *Gordon,* 11 Fed.Cas. 480, Case No. 6047 (1823); *Aguilar* v. *Standard Oil Co.,* 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943); *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692, reh. den., 338 U.S. 839, 70 S.Ct. 32, 94 L.Ed 513 (1949).

46 U.S.C. § 596, designed to secure the prompt payment of seamen's wages, to protect them from the harsh consequences of arbitrary and unscrupulous actions of their employers and to prevent such employers from unjustly enriching themselves while wrongfully denying their seamen the benefits of their labor, is part of a broader protective and remedial scheme intended for the benefit of seamen. *Collie* v. *Fergusson,* 281 U.S. 52, 50 S. Ct. 189, 74 L.Ed. 696 (1930); *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971); *American Foreign S.S. Co.* v. *Matis,* 96 S.Ct. 410, 46 L.Ed.2d 354 (1975); *Mavromatis* v. *United Greek Shipowners Corp.,* 179 F.2d 310 (1st Cir., 1950).

46 U.S.C. § 682, mandating the intervention of a United States Consular Office upon discharge of a seaman and payment of his wages in a foreign port, is part and parcel of that protective and remedial scheme.

It places between the seaman and the Master an official representative of the United States Government who is authorized to protect the interests of the seaman. 1 Norris, The Law of Seamen, § 43 (1970). It is hornbook law that a seaman must be discharged before an American Consul. *Mattes* v. *Standard Transp. Co.,* 274 F.1019 (S.D.N.Y., 1921). If a Consul is not present at the port where the vessel is, the Master should carry the seaman to the next port of call where the Consul is present. 1 Norris, The Law of Seamen, § 44 (1970).

On such discharge, the Consul must settle the wages of the seaman by collecting the wages on the seaman's behalf

or supervising, upon the election of the seaman, acceptance of a voucher evidencing the amount owed the seaman to be paid in future settlement. 22 C.F.R. 82.16, 82.17.

These Rules make it unlawful to discharge a seaman in a foreign port without the sanction of a United States Consular Officer and are quite detailed for the protection of a seaman with respect to payment of his wages.

The language of Justice Story in *Harden* v. *Gordon,* 11 Fed.Cas. 480, Case No. 6047 (1823), is particularly applicable here:

> "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached."

This mandate of the Congress is so strong that a shipowner will not be heard to argue a defense of mutual consent even in a case where the Consul is present, and the Consul himself neglects to comply with the rules, *Miner* v. *Harbeck,* 17 Fed.Cas. 437, Case No. 9629 (1849); and a seaman will not be heard to urge a complaint of cruelty as justification for desertion of his vessel where the seaman fails to seek the assistance of a Consul. *Ennis* v. *Waterman S.S. Corp.,* 49 F.Supp. 685 (S.D.N.Y., 1943).

It is plainly unlawful to discharge and make arrangements with a seaman with respect to payment of his wages without the supervision and sanction of a United States Consular Officer. *The T. F. Oakes,* 36 F.442 (1882); *The Golden Sun,* 30 F.Supp.354 (S.D. Cal., 1939); *Mattes* v. *Standard Transp. Co.,* 274 F.1019 (S.D.N.Y., 1921); 1 Norris, The Law of Seamen, § 44 (1970); 22 C.F.R. 82.16, 82.17.

As this Court states in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351, 366, 91 S.Ct. 409, 417, 27 L.Ed.2d

456 (1971):

> ". . . the very essence of the legislative policy at stake here is insuring promptness in the payment of wages."

The decision of the Court below opens the door to the very evils which the legislative protective scheme intended to prevent.

POINT II

The acceptance by a seaman of a voucher in lieu of cash upon discharge in a foreign port does not relieve a shipowner from the penalties of 46 U.S.C. § 596 when the shipowner wrongfully delays payment of the earned wages to the seaman.

In effect, the Trial Court held, and the Court below sanctioned, that an election by a seaman to take a voucher in lieu of cash upon discharge in a foreign port

1. constitutes a means of avoidance of 46 U.S.C. § 596 penalties although a shipowner may subsequently delay payment;
2. shifts the duty upon a seaman of demanding his wages before the shipowner's obligation to pay arises; and
3. imposes upon a seaman the duty to present such voucher to the shipowner as a condition of payment.

These results are unjust when viewed in the light of the reasoning of the Courts and the Legislature for their protective attitude over seamen in general and especially regarding their wages. *Harden* v. *Gordon,* 11 Fed.Cas.480, Case No. 6047 (1823); *The David Pratt,* Fed.Cas.No. 3597 (1839); *Collie* v. *Fergusson,* 281 U.S. 52, 50 S.Ct.189, 74 L.Ed.696 (1930); *American Foreign S.S. Co.* v. *Matis,* 96 S.Ct. 410, 46 L.Ed.2d 310 (1975).

The conditioning of payment of a seaman's wages upon a demand, producing a voucher, or performing any other act other than signing a receipt for his wages, is unlawful and without sufficient cause within the meaning and intent of 46 U.S.C. § 596. *Forster* v. *Oro Navigation Company,* 128 F.Supp.113, aff'd 228 F.2d 391 (2d Cir., 1955); *Mavromatis* v. *United Greek Shipowners Corp.,* 179 F.2d 310 (1st Cir., 1950).

The respondent had numerous opportunities to pay petitioner his undisputed earned wages personally to him in Japan or New York; to his Union as it did the disputed overtime wages; into the registry of the Court to at least protect the wages; or even upon the trial.

Respondent at all times knew the amount of the undisputed wages and that such wages were due and owing.

Its withholding of the wages was done in bad faith, wrongfully enriching itself at the expense of petitioner while justifying its wrongdoing upon the insignificant failure of petitioner to produce the original voucher.[1]

The question here is not why petitioner failed to present his voucher for payment, but whether the shipowner was justified in delaying payment for almost three years.

A voucher is given to a seaman for his sole benefit as an accounting and evidence of the Master's certification of the balance due the seaman for his services rendered. 46 U.S.C. § 82.17. It does not in law represent something in the nature of a promissory note requiring presentation for payment.

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[1] Apparently, neither the Trial Court nor the Court below considered respondent's condition of requiring petitioner to appear before a U.S. Shipping Commissioner in New York as its excuse for delaying payment of the wages significant in the case. In any event, petitioner was fully discharged in Ras Tanura, having executed all the necessary documents. The condition of appearing before a Shipping Commissioner is required only when a seaman is discharged in a United States port. 46 U.S.C. § 641.

In sanctioning the Trial Court's result, the Court below radically departed from the host of judicial decisions and statutory enactments zealously made to protect the seaman against a shipowner's overreaching with respect to payment of wages.

As Judge Learned Hand stated in *Petterson* v. *United States*, 274 F. 1000 (S.D.N.Y., 1921):

> "Seamen are wards of the Court, no doubt and are protected against their own carelessness. The statutes, especially the revision of 1915, shows an increased solicitude for their welfare, which Courts have no right to view with jealousy."

Conclusion

All seamen are vitally concerned with whether or not their right to the protection of a representative of the United States Government upon discharge in a foreign port is subject to curtailment by judicial decision, destructive of and a radical departure from well-established Congressional policy.

It is respectfully submitted that this case presents serious and important questions of the rights of seamen to the prompt payment of their wages.

By reason of the foregoing, petitioner prays that this Honorable Court take under advisement the questions herein presented by granting the petition for writ of certiorari.

Respectfully Submitted,

DONALD D. OLMAN
Attorney for Petitioner

APPENDIX A

Opinion of the District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2227

JOHN THEODORE GILBERT,

Plaintiff,

against

AMERICAN EAGLE TANKER CORP.,

Defendant.

METZNER, D. J.:

In this action plaintiff, a seaman, seeks to recover damages from defendant, the owner of the S.S. American Eagle, for alleged breaches of law.

Defendant needed a relief man for Butler, the second assistant engineer on its vessel which was engaged in Middle East trade. It signed plaintiff in New York on December 21, 1971, to proceed to meet the vessel at Ras Tanura in Saudi Arabia. The employment was to continue until Butler's vacation time was up and he rejoined the vessel. Plaintiff boarded the vessel on December 29.

On May 18, 1972, plaintiff was given a voucher worksheet showing details of wages due, overtime, advances, etc. He was told that the regular assistant engineer was returning on May 20 and his employment according to the agreement of hire would be over on that day. The voucher worksheet was supplied in advance so that he could check on the accuracy of the figures.

On the morning of May 20, he went to the master's cabin to receive his pay and arrange to leave the vessel which at the time was at Ras Tanura. The master issued a certificate of discharge which indicated that plaintiff had completed his relief job and since a consular officer was not available, the payoff was made by the master.

The pay voucher indicated wages due of $5,228.71, plus $5,557.57 overtime. Plaintiff claimed an additional $497.34 which was due for overtime, and insisted that he be taken to a consular officer for discharge. There was no such officer at Ras Tanura. In addition, the master pointed out that pursuant to the union contract, the question of overtime was a matter to be settled between plaintiff's union representative and the defendant.

Plaintiff, pursuant to his request, was given $2,000 in cash and a voucher for the balance due as shown on the wage sheet. He also received a first class air ticket back to New York by way of Paris.

Although plaintiff always signs on for jobs in New York, he lives in Yokohama, and he went there for several months before returning to New York. He then brought his grievances to the attention of the union. These grievances included failure to pay the correct amount of overtime, failure to properly credit him with travel time to New York, improperly discharging him on May 20 because Butler had not returned to the vessel, failure to pay one month's wages as provided by 46 U.S.C. § 685, etc.

The union representative pressed plaintiff's claim for overtime through exchange of correspondence and several conferences. The claim was ultimately disposed of by the payment of $76.14. Plaintiff was told to present to defendant the voucher he received from the master for the $5,121.19 still due him. He claims he stayed in New York from July 1972 to May 1973 trying to get paid, but he never went to defendant's office with the voucher to collect his due. There was no failure on the part of defendant to pay wages so as to make it liable for the double payment provided by 46 U.S.C. § 596.

There was no violation of 46 U.S.C. § 685 requiring the master to take plaintiff to a consular officer. That section was enacted to prevent an unscrupulous master from stranding an unfortunate seaman in some far off place. Plaintiff was not being discharged improperly. His term of employment ceased according to its terms. His grievance for overtime was adequately covered by the collective bargaining agreement, a procedure unknown at the time of the adoption of the section in 1840.

Plaintiff seeks to come within the section by claiming that because of standing uncalled-for watches which is the basis for the overtime claim, he was subject to cruel treatment. There is no basis for this claim.

Defendant consents to the payment of $46.56 for failure to properly credit travel time and subsistence from Ras Tanura to New York.

Judgment shall be entered accordingly.

So ordered.

Dated: New York, N. Y.

APPENDIX B

Judgment in the District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2227 (CMM)

JUDGMENT

JOHN THEODORE GILBERT,

Plaintiff,

—against—

AMERICAN EAGLE TANKER CORP.,

Defendant.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Charles M. Metzner, United States District Judge, on December 5 and 6, 1974, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on April 1, 1975, having handed down its opinion, directing that judgment be entered in favor of the plaintiff, on the consent of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff JOHN THEODORE GILBERT have judgment against the defendant AMERICAN EAGLE TANKER CORP., in the amount of $46.56.

Dated: New York, N.Y.
April 3, 1975

RAYMOND F. BURGHARDT
Clerk

APPENDIX C

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November, one thousand nine hundred and seventy-five.

Present: HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. ALBERT W. COFFRIN,
District Judge Sitting by Designation.

75–7255

JOHN THEODORE GILBERT,

Plaintiff-Appellant,

v.

AMERICAN EAGLE TANKER CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed*. See memorandum attached.

LEONARD P. MOORE
United States Circuit Judge

WILLIAM H. TIMBERS
United States Circuit Judge

ALBERT W. COFFRIN
United States District Judge
Sitting by Designation

APPENDIX D

Opinion of the Court of Appeals.

GILBERT v. AMERICAN EAGLE TANKER CORP.

MEMORANDUM

The trial court found that the shipowner made tender of full payment to appellant at the time of discharge; there is sufficient support for this finding in the record. Accordingly the shipowner cannot be held liable for penalty pay under § 596. Appellant's own attitude toward the collection of his back pay reinforces the propriety of this result.